No. 3077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HATTIE HARDESTY CHAPMAN,
Appellant,

vs.

R. M. SIMS, Trustee in Bankruptcy of The Realty Union, a Corporation, Bankrupt,
Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANT

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Inasmuch as counsel for appellee in this case, in their brief in reply to the opening brief of appellant, have confined themselves almost wholly to a discussion of points which were decided against them by both the Referee in Bankruptcy and the learned Judge of the District Court, but which, in themselves, were not sufficient to turn the decision on the whole case, in the opinion of the learned Judge of the Court below, against them, we have asked and have been granted leave of this Court to file this brief in answer to such brief of the appellee.

The facts of the case are, we think, sufficiently set forth in the briefs heretofore filed.

Counsel for appellee, in their brief, make the following points, viz.:

1. Plaintiff, by taking a contract, which entitled her to land other than that which she disposed of, took security within the meaning of the law of Vendor's Lien.

2. The nature of the contract shows the lien was waived.

3. Equity will not enforce an inequitable demand.

4. If the lien ever existed it was waived by demanding real property for the certificates.

5. A Vendor's lien is not assignable and, therefore, the fact that Wallace attempted to give Hattie Hardesty Chapman his right to the part of the certificates issued for the North fifty-three feet, eight inches, was wholly ineffectual and caused a waiver of the lien.

These points we propose to answer in their order, taking the first two points together.

These two points are based wholly on the provision in the "Investment Certificates" (so-called) reciting that "any owner of investment certificates of a paid up value of not less than One hundred dollars may exchange them for unimproved realty held for sale by the corporation."

Both the Referee in Bankruptcy and the learned Judge of the District Court held that this provision, even if of any validity at all, considering its vague-

ness and uncertainty, merely provides another means of payment by The Realty Union and was not any additional security such as is contemplated by law and equity as sufficient to defeat a vendor's lien.

This is obvious from the wording of the provision itself. This matter was wholly in the hands of The Realty Union. If it chose to put up any of its property for sale at a price fixed by itself, appellant, if she desired, could take such property in lieu of the cash payment secured by the promissory notes stated in the certificates. This did not constitute a distinct and independent security for the payment of the promissory note such as the law contemplates, but was merely a means by which The Realty Union, if requested, if it saw fit to do so, could pay its debts.

In all the cases cited by counsel for appellee in support of their contention in this regard, viz.:

Hunt vs. *Waterman,* 12 Cal. 301;

Camden vs. *Vail,* 23 Cal. 634;

Baum vs. *Grigsby,* 21 Cal. 173;

Jones vs. *Allert,* 161 Cal. 234;

Claiborne vs. *Castle,* 98 Cal. 30;

Avery vs. *Clark,* 87 Cal. 619,

the security, which was held to avoid a vendor's lien, was a distinct independent security, either a

mortgage on the property sold, or a mortgage on other property, or a promissory note of a third person, or the endorsement of a third person on the promissory note of the vendee; and it is such a security only that will avoid a vendor's lien.

In support of our contention that a distinct and independent security is meant, we submit, in addition to the case of *Brisco* vs. *Minah Con. Min. Co.,* 82 Fed. 952, cited in the opinion of the District Court, in this behalf, the following:

> "On the other hand the lien will be considered as waived whenever any distinct and independent security is taken whether by mortgage on other land, or pledge of goods or responsibility of a third person; and also when security is taken upon the land, either for the whole or a part of the unpaid purchase money unless there is an express agreement that the lien shall be retained. The taking of the vendor's obligation does not affect the lien, but the taking of a mortgage on other property, or a bond or note of the vendee with security or a negotiable note drawn by the vendee and endorsed by a third person, or drawn by a third person and endorsed by the vendee, or a draft on a third person and accepted by the drawee, will repel the lien presumptively."
>
> *Mackreth* vs. *Symmons,* 1st White and Tudor L. C. in Eq. 447, (Hare and Wallace Notes).
>
> "If other security (so-called) is not distinct and independent, but is simply contractually additional, the lien is not only not discharged, but is strengthened."

Note to *Royal Con. Min. Co.* vs. *Royal Con. Mines,* 137 Am. St. Rep. 165;

See also *Fischer* vs. *Shropshire,* 147 U. S. 133, 13 S. C. R. 201.

The case of *Greenberg* vs. *Cal. B. R. Co.,* 107 Cal. 667 (cited by appellee) is not in point. The facts of that case show that the land was sold to a corporation not for money but for a definite number of shares of stock of the corporation and that the corporation was at all times ready and willing to deliver the stock. Of course no vendor's lien could arise.

Also the case of *McKillip* vs. *McKillip,* 8 Barb. 560, (cited by appellee) is not in point. That was not a case of a sale of land for a money consideration. The consideration was an agreement to support and maintain the vendor. In commenting on this case the New York Court of Appeals in *Zeiser* vs. *Cohn,* 207 N. Y. 407, 101 N. E. 184, said:

> "There are certain cases in this State which on a superficial examination would seem to indicate that no lien (vendor's) will be sustained in favor of third persons; but a careful reading of the opinion will disclose that the real reason underlying the decisions is that the agreements under which liens were claimed were not acknowledgments for the payment of money to third persons, but agreements for support and maintenance. *McKillip* vs. *McKillip,* 8 Barb. 552; *Camp* vs. *Gifford,* 67 Barb. 434.
>
> Agreements of that character have always occupied a peculiar place in the law of contracts to which the principle of specific performance

is more applicable than enforcement by lien. This distinction may explain the apparent contradictory statements by Judge Story in Story's Equity Jurisprudence, Sections 1227 to 1233.

See Pom. Eq. Jur., Sec. 1251 *et seq.*

Appellee's point three—Equity will not enforce an inequitable demand.

Appellant at all times looked to The Realty Union for cash as called for in the promissory notes given by The Realty Union. She had no intention of investing in The Realty Union's certificates as such. The testimony of Mr. Roosevelt Johnson, Manager of The Realty Union, shows this clearly. Quoting from his testimony (Tr. p. 124):

> Q. (By his counsel, Mr. Brandt) Did Miss Chapman ask you any questions with reference to the certificates at that time, do you recollect?
>
> A. Only to know how short a term to get.
>
> Q. And what she wanted to know was the shortest term she could get? Do you recollect what you told her?
>
> A. Yes. I told her ten years.

The testimony of appellant, quoted in our opening brief, (Tr. pp. 66 to 68) is also clearly expressive of this. Also quoting from the testimony of Mr. Wallace (Tr. p. 143):

> Q. (By Mr. Aydelotte on cross-examination) Mr. Wallace, I will ask whether or not

you thought at the time Miss Chapman was given these certificates, so-called, for $19,000.00, that the money would be paid when they fell due?

A. Unquestionably.

Q. You so thought?

A. Absolutely.

Q. And you so advised Miss Chapman?

A. I so advised Miss Chapman. I so believed, surely.

Of course, there can be no assertion of inequity in appellant claiming the enforcement of her vendor's lien as against those investors in The Realty Union certificates who made their investments prior to the sale by appellant of the land in question to The Realty Union. Such investors certainly could not have looked to this land as any security backing up their certificates. The only testimony as to the amount owing to such prior investors is given by Mr. Johnson (Tr. pp. 167 to 175), and he can merely approximate the amount. About $500,000 or $600,000 before June, 1912 (the date of the conveyance of this land by appellant to The Realty Union), and from $150,000 to $200,000 after that date.

We submit, however, that those investors in The Realty Union's certificates who made their investments after the sale by appellant to The Realty Union, cannot be heard to complain of appellant's

claim, nor can they have any rights superior or equal to appellant's rights to a vendor's lien for the reason, as stated in our opening brief, that they are chargeable with knowledge of The Realty Union's methods of doing business, and for the further reason that none of these investors in The Realty Union certificates had any lien or claim upon this particular land known to law or equity. The Realty Union held this land at all times after its conveyance in its own name. It did not convey it to any innocent purchaser, nor did it charge it directly with any of its debts to any innocent creditor except to the extent of a small mortgage to the Hibernia Savings and Loan Society whose priority to the extent of that mortgage we don't dispute.

> "The lien of the vendor exists against the vendee and against volunteers and purchasers under him with notice or having an equitable title only. But it does not exist against purchasers under a conveyance of the legal estate for a valuable consideration without notice if they have paid the purchase money. The lien will also prevail against assignees claiming by a general assignment under bankruptcy laws; and against assignees claiming under a general assignment made by a failing debtor for the benefit of creditors, for in such cases the assignees are deemed to possess the same equities only as the debtor himself would possess. So it will prevail against a judgment creditor of the vendee before an actual conveyance of the estate has been made to him; and as it should seem against such a judgment creditor after the conveyance for each party, as a creditor, would

> have a lien on the estate sold with an equal equity, and in that case the maxim applies, *Qui prior est in tempore, potior est in jure.*" 2 Story Eq. Jur. (13th Edn.), Sec. 1228 and cases.

These subsequent investors were not given any definite lien on the land in question and are, of course, later in time than appellant and any rights they may have to subject the land conveyed by appellant to their claims are of a vague general nature and cannot supersede appellant's definite and special vendor's lien.

Further, no evidence at all was adduced in this case to show how much or little of this $150,000 or $200,000 invested in certificates after June, 1912, was so invested before appellant filed her action and recorded notice of *lis pendens* March 11, 1915, and how much or how little thereof after that date.

The Realty Union was not adjudicated a bankrupt until Sept. 11, 1915, and, although there is no evidence on the subject, we must presume that it was engaged in business up to that date.

Such latter investors were, of course, legally charged with notice of appellant's claim of lien, and certainly cannot assert that they made any investment with the Realty Union on any supposition that the Realty Union enjoyed complete and unincumbered ownership of appellant's land.

See *Fisher* vs. *Shropshire et al.*;
147 U. S. 133;
13 S. C. R. 201.

The burden of proof resting upon appellee to establish a waiver of lien by appellant cannot be discharged by vague and uncertain guesswork.

We submit, therefore, that, while no evidence concerning the number of investors in Realty Union certificates, as such, or concerning the amount of money invested by them (such investors being chargeable with notice of the Realty Union's method of doing business) is material in this case, or can have any weight to defeat appellant's lien, yet, if such evidence is material and does have any such weight, it must be specific and positive, especially in view of the fact that it was wholly in the power of the appellee here, and no one else, to furnish such evidence.

None of the investors can ask or expect anything more than to be subrogated to such rights only as the Realty Union itself had.

In the case of *Welch* vs. *Farmers L. and T. Co.*, 165 Fed. 561, (cited by appellee) the Court say at p. 565:

> "The general rule is well settled that ordinarily the vendor of real estate or of an interest therein is entitled to a lien upon the estate sold for so much of the purchase price as remains

unpaid at the time of the conveyance; and it is admitted that this general rule is recognized as prevailing in Ohio, nor is it doubted that it is a principle of equity recognized by the Courts of the United States in all jurisdictions wherein it is not otherwise ordained by the local law. But the rule has its limitations. Being a creature of equity, and not of positive law, it must yield to a superior equity. So it cannot prevail against a purchaser from the vendee, for value, without notice of the existence of such a lien; for it must be admitted that one who has not taken the precaution to protect his right by some visible muniment of it, and allowed another to wear the appearance of ownership and of the power of disposition, stands upon far lower ground in the estimate of equity than one who, in good faith and relying upon the appearances which the original vendor has permitted his vendee to assume, has become a purchaser and has paid the consideration of his purchase. Hence the exception to the rule is that while the lien may be asserted against the vendee and all others standing only on his right, it cannot prevail against those who have also acquired an equity which puts them on higher ground than that of the first vendee. A subsequent purchaser, although for value, yet having notice of the facts which would entitle the first vendor to a lien, an heir, an assignee in bankruptcy, or any other who has parted with nothing, is not clothed with an equity, but has only the right of the vendee, and cannot deny the lien."

In the case of *Trust Co.* vs. *Steel Co.,* 79 N. J. E. 501, 82 Atl. 146, the Court say:

"The doctrines concerning vendor's lien are firmly established in our jurisprudence. They

give to the grantor or vendor who has parted with the title to his property an equitable lien on the property conveyed, to secure the payment of the purchase money. It is not a right which necessarily arises out of contract; it is rather an equity raised out of the circumstances on the ground of a constructive trust, to protect the vendor to such an extent as may be necessary; and it is difficult to see how, as between the parties, the force or effect of the lien could be enhanced by a mere agreement that a vendor's lien should be reserved, (Cited cases).

"The lien, however, may be lost by a *distinct* waiver of it or by a transfer of the title by a grantee *to a purchaser for value and without notice.* (Italics ours.)

"The grantee or mortgagee of the vendee who has notice, or is in such circumstances as that he is put upon inquiry, would take title to, or a lien upon, the premises subject to the lien of the vendor. These principles are very clear and plain. (Citing cases.)

See also in this connection *Van Doren* vs. *Todd,* 3 N. J. Eq. 397.

Appellee's point four—

If the lien ever existed it was waived by demanding real property for the certificates.

The evidence shows that no definite demand was ever made by appellant for land in lieu of the money due on The Realty Union's promissory notes. The testimony of appellant in this regard is as follows (Tr. pp. 100, 101):

Q. (Mr. Aydelotte) Is it not a fact, Miss Chapman, that at the time you had this talk with Mr. Johnson that Mr. Johnson told you there were some incumbrances on this property?

A. Yes.

Q. Did you expect Mr. Johnson to give you $40,000 worth of property for $19,000?

A. No, I did not.

Q. Isn't it a fact that you asked Mr. Johnson about getting this property back, having in mind the possibility of an amicable settlement of this whole business?

A. Yes.

Q. Isn't it a fact that your answer to the former question with relation to fixing the price upon the property was with relation to your $19,000, together with whatever mortgage there might be upon the property, and then making an adjustment of the whole thing?

A. Yes.

Recross-examination.

Q. (Mr. Clark) In other words, if the property had gone up so that it was five times as valuable as it was before, you expected that the $19,000 and the

amount of the mortgages would be deducted from the value of the property, didn't you?

A. I expected only my $19,000 because I sold to them for a certain amount and I didn't expect any more from them.

Q. You answered your counsel that you didn't expect $40,000 for $19,000?

A. Yes.

The REFEREE.—I think, counsel, that you will not accomplish any more by pursuing this line of examination.

Mr. CLARK.—Let me ask this question, finally:

Q. If the property had gone up so that it had become worth $100,000, you would not have expected the return of that property to you, for the certificates, would you?

A. I would have expected $19,000 out of it.

Q. If it had been turned back you would have expected $19,000 worth of it?

A. I would have expected $19,000 and they would be entitled to the rest.

Q. Then you would have expected that The Realty Union, in making its adjustment with you, would fix some price upon the property?

A. I don't see what that has to do with it. All I wanted was to get my money.

Mr. AYDELOTTE.—Q. Miss Chapman, is it a fact that these conversations with Mr. Johnson were before or after you consulted your attorney with reference to a possible compromise settlement of this whole matter?

A. They were after I consulted my attorney.

Testimony of W. M. Aydelotte. (Tr. pp. 102 to 107)

The WITNESS.—I will state that as the attorney for Miss Chapman I made at least a half dozen trips to the office of the Realty Union and had conversations with Mr. Johnson relative to a compromise settlement of this whole affair, so as to avoid any litigation or entanglement. Mr. Johnson himself proposed to me, or made the proposition that we accept a note and mortgage due in three years, on this identical property. He claimed the property was worth more—was worth some fifty or sixty thousand dollars. I said, "Will you let me have some lists of those various properties which you have for sale?" And I says, "I will look over those lists and if anything appears to be right, and we can in that way effect an amicable adjustment of this matter which is satisfactory to Miss Chapman, we will see what can be done"; that I would much rather have the whole thing adjusted that way than

to have it strung out in a lawsuit. The interest was past due, and I demanded the interest but it was not forthcoming. Mr. Johnson told me the condition of the affairs of the corporation, and told me very frankly that they were in a bad way. And we had several meetings. One meeting we had in my office when Mr. Grace was present, at which the proposition of the mortgage [79] was discussed, and he told me the mortgage was on these two pieces of property, not on the one piece described in the complaint. And then coming to those conversations, and the counter propositions for a compromise settlement, on the 10th day of May or the 11th day of May, and a year ago last May I filed my suit on behalf of Miss Chapman to declare a vendor's lien on this property. All of the requests for lists of property were made at my suggestion, and with a view to a compromise of this situation. Any questions, Mr. Clark?

Mr. CLARK.—Q. Have you any memorandum of when Miss Chapman first came to you?

A. Why, I think, Mr. Clark, it was along about the first of March; somewhere in there. It seems that it was either shortly before or after the first of March. I see by the date of this letter of March 15th with reference to the statement that the payments would be withheld. It is either before or after that date.

Q. When you asked Mr. Johnson for a list of this property what made you think you were entitled to ask for a list?

A. I recognized and thought at the time that there would be no reason for asking for lists by virtue of any right; that that particular clause in the certificate didn't amount to anything, because it was not a right which we could exercise. It was a right which the corporation could exercise at its own pleasure and profit, but it was of no value to the promissory note holders.

Q. Did you tell your client that before you went over and demanded a list?

A. I don't know whether I did or not. I know that I had never explained the situation fully to my client.

Q. Had you read that particular clause in the investment certificate before you went over and demanded a list?

A. I certainly had.

Q. How many times?

A. Maybe two or three times.

Q. Was it because of that provision in the investment certificate [80] that you did go over and demand a list?

A. No, not any more than if you had owed me a thousand dollars and could not pay me, I might have gone to you for some of your property to meet the indebtedness.

Q. Did you ever make the suggestion to Mr. Johnson that the document on its face said that you had a right to exchange it for real property of this company that might be held for sale?

A. Yes, I made such a suggestion to Mr. Johnson, with this coupled to it, that the right didn't amount to a hill of beans, because the company had it in its power at all times to fix the price of the property.

Q. When you asked for a list did you tell the company that you would like to have a list of property, and to have them specify the prices that might be put upon it, or the prices that it might be held at?

A. Yes, and I told him to make the prices the best he could, because of the accrued interest that was due to Miss Chapman, and I wanted to favor her all I could.

Q. Well, at the time of these several conversations did you or your client, Miss Chapman, demand any lists?

A. I never demanded any lists.

Q. When you asked for a list you asked for prices?

A. I expected that they would give me prices.

Q. Did you as an attorney consider at that time the compromising of this case, or of this lady's claim, without making a demand of that sort? You had a list of these properties held for sale. Would you have called it compromising the case if you had traded off $19,000 in certificates for property held at $19,000? A. Yes.

Q. In what way would such a deal have departed, in your judgment, from the language of the investment certificate?

A. I will tell you why. Because Miss Chapman had the right absolutely to rely upon [81] the promise to pay the $19,000 in money. She was not obligated to take one single piece of property; and the surrender of this promissory note, or of this claim, against the corporation for $19,000 in property, and the taking of any property for it, or the taking of anything except money, would be a compromise of the case.

Q. Even though it had been exercised in accordance with the terms of the investment certificate?

A. Yes, sir; because that was merely a method suggested to discharge the obligation. And that method exists independent of any contract.

Q. Would you say that it existed independent of any contract if at any time the Realty Union had held for sale, in accordance with the terms of its contract, lists of property? A. Yes, sir.

Q. As an attorney at law were you not familiar with the fact that specific performance of a contract can be enforced even though the right to enforce specific performance depends upon the selection of a particular piece of property by a person claiming to have a right to have a specific performance?

A. That may be, but still, when the price of the property is left to arbitrary discretion of the owner, the one who holds it, it looks to me a bait to get somebody to buy these promissory notes without any value whatever.

Q. Don't you know that the rule is that specific performance of a contract must receive a fair construction, and that no Court would ever sanction the fixing of an arbitrary price, as you call it, at an exorbitant figure, in the event that you had gone to court on a suit for specific performance?

A. That is true, to a certain extent. But the Court will also assume that an arbitrary price will be fixed.

Q. When you went in there you say you went in by the authorization of your client. Didn't you find that you were making a demand that you were entitled to make under the strict terms of the invest-

ment [82] certificate, when you were asking for a list of property?

A. I say I told Mr. Johnson that that particular provision in there didn't amount to a hill of beans, in my opinion, and that is my opinion still.

This testimony shows clearly that it was not until after the failure of the Realty Union to meet its interest obligations on the notes given appellant that an attempt was made in the nature of a compromise to get the best settlement possible out of the Realty Union without resorting to litigation.

The cases cited by counsel for appellant in their brief in support of this, point four, namely, *Moshier* vs. *Meek,* 80 Ill. 79, *Claiborne* vs. *Castle,* 98 Cal. 30, and *Gessner* vs. *Palmateer,* 89 Cal. 89, are cases in which there was a definite and positive waiver of lien by the vendor before any breach by the vendee.

Even if it were the fact that appellant made a demand for land in payment of her money claim (and the evidence does not warrant such conclusion) nothing came of it and she made no attempt to enforce any such demand.

The law is very clear that this cannot amount to a waiver. A vendor's seeking a compromise can be no implication in itself of a waiver of his vendor's lien.

The case of *Braun* vs. *Kahn,* Vol. 54, Cal. Dec. 341, cited in our opening brief, and the most recent case on this subject decided in this state, shows that a vendor does not waive his lien even by pursuing his claim to judgment in an action on the debt itself.

> "The vendor's lien not being in writing or created by contract, and being only implied in equity, requires no writing to effect a release; and as it exists only by inference, anything that indicates that it is not relief on or is waived may be shown to rebut such inference. But, while this is the law, it is equally true that so long as the debt exists Courts will not presume that it has been surrendered without satisfaction, unless upon clear and convincing testimony. The burden of proof of a waiver rests upon the party alleging it; and as such waiver is largely a matter of intention, if it be doubtful from all the facts and circumstances the lien will be presumed to be still in force. Nor is it necessary for the vendor, in an action to enforce his lien, to allege that he has not waived the same; or, if the action is against a third party, that such defendant took with notice, for waiver or want of notice must be set up in the pleadings of the defendant and proved as a defense.
>
> "Sec. 699. What amounts to waiver or abandonment. It is a settled doctrine that any act or declaration of the vendor evincing an intention to release his equitable lien, or which shows that he does not rely upon it, is sufficient to constitute a waiver of the same, and, as a rule, a Court of equity cannot revive a lien which has thus been waived. Where there has been an express agreement of waiver this result

will follow as a matter of course, while the authorities are quite united in declaring that the taking of other and independent security operates as a waiver and extinguishment. The lien is not waived, in the absence of an express agreement to that effect, by the fact that the vendor takes the note or other personal security of the vendee for the money, for such personal security is considered only as intended to meet and overcome the acknowledgment of the receipt of the purchase money in the deed, and, in effect, is not to be taken as payment, but simply as an evidence of the amount due and the time and mode of payment; but the acceptance of a mortgage on the land conveyed or of other property will ordinarily be deemed a waiver, while the same effect results from a deposit of stock or a pledge of goods. Accepting the responsibility of a third person has ever been held to work a waiver, as where the vendor takes a bill of exchange drawn by the vendee upon a third person and by him accepted; or a note of a third person indorsed by the vendee; or the vendee's own note with surety or indorser; or where, at the time of the sale, the vendor takes from the vendee a bond, with the responsibility of a third person as security for the purchase money. From every circumstance of this character, in the absence of unequivocal evidence to the contrary, a Court of equity will presume that the vendor did not trust to the property as a pledge for the security of his money, and hence, as he did not rely upon his equitable lien, that it has been abandoned."

Warvelle on Vendors (2d Edn.) pp. 828, 829, 830, parts of Sections 698 and 699.

Appellee's point five—

A vendor's lien is not assignable and, therefore, the fact that Wallace attempted to give Hattie Hardesty Chapman his right to the part of the certificates issued for the north fifty-three feet, eight inches, was wholly ineffectual and caused a waiver of the lien.

The facts of all the cases cited by appellee under this point show that the vendor attempted to assign his claim to a vendor's lien *after* the conveyance by him to his vendee and therefore after his claim to such lien arose. We do not dispute the correctness of the decisions in these cases.

In the case at bar, however, appellant and her agent, Wallace, joined in the conveyance of the whole of the land in question. Both the Referee in Bankruptcy (Referee's Certificate on Petition to Review, Tr. at p. 223) and the learned Judge of the Court below (opinion and order affirming order of referee, Tr. at p. 243) held that this procedure could not destroy appellant's right to her vendor's lien. The whole purchase price was made payable to the appellant, and, it is obvious, as said by the Referee in Bankruptcy, that the whole transaction was one between appellant and The Realty Union.

The evidence shows that Wallace was merely the agent of appellant and whatever he may have done in and about the transaction was simply preliminary. The final negotiation was had wholly between the appellant and The Realty Union. Anything

Wallace may have done before such final negotiation would, of course, be merged in the transaction between appellant and The Realty Union.

If, however, Wallace is to be considered as the owner of the small portion of the land which stood in his name at the time of the conveyance by him and appellant, jointly, to The Realty Union, it was entirely competent for him to contract that the whole purchase price should be payable to a third person and that such third person should have the vendor's lien arising out of his conveyance.

> "It is competent for the vendor and vendee of land to contract that the latter shall pay the purchase price or part of it to some other designated person, and when it is so agreed, such other person may enforce against the vendee such rights as it was intended he should have. So where land is sold by title bond which provides that the whole or a part of the consideration shall be paid to a third person named, the legal title retained by the vendor inures to the benefit of the third person and he has a lien on the land for the sum required to be paid him. Therefore when the note of the vendee is made to one other than the vendor, the vendor's lien is not affected, the same as if he had taken the note and assigned it, with any intention of abandoning his lien. *Zwingle* vs. *Wilkinson,* 94 Tenn. 256; 28 S. W. 1096; *De Bruhl* vs. *Maas,* 54 Tex. 464; *Jones* vs. *Perkins,* 59 Tex. 300;"
>
> Note to *Royal Con. Min. Co.* vs. *Royal Con. Mines* in 137 Am. St. Rep. 165 *et seq.*;

See Warville on Vendors (2d Edn.) Sec. 685, p. 815;

Zeiser vs. *Cohn,* 207 N. Y. 407, 101 N. E. 184.

DeLong vs. *Marshall,* 66 Fla. 410, 63 So. 723.

"Although the general rule is that a vendor's lien on real estate for the purchase money is given to the person who owns the title and conveys, it is not indispensable that the legal title should have been vested in the party who claims the lien, nor that the deed or conveyance should have been actually executed by him. If he is the owner of the land in equity, and controls the legal title, and causes the conveyance to be made by the holder of the legal title to a third party, and is entitled to the purchase money, he is entitled to a vendor's lien therefor."

Syl. Loomis vs. *Davenport,* 17 Fed. 301;

Brisco vs. *Minah Con. Min. Co.,* 82 Fed. at p. 955.

In conclusion, we submit that none of the points made by counsel for appellee herein is tenable and we reiterate and urge our contention that the Court below was not justified in drawing the inference and conclusion from the evidence adduced in this case that appellant joined in the speculative schemes of The Realty Union and threw her land into a "common pot."

Counsel for appellee, at the oral argument of the case, stated that "appellant lay back for about three years after selling her land and, then, when she

thought the Realty Union was in a bad way, sought to secure herself at the expense of others."

This is not so. The notes given appellant by the Realty Union were not to mature until ten years after date. As long as the interest agreed upon was paid regularly, appellant was justified in her position. It was only when the Realty Union failed to meet its obligations that appellant could pursue her remedy. The case of *Finnell* vs. *Finnell,* 156 Cal. 589, a case in which a ten year note formed the basis of the claim, and a case in which the lien claimant waited until *one day* before the lapsing of the time limited by statute before bringing his action, is a most instructive case on all the questions involved in the case at bar.

This case and the case of *Royal Min. Co.* vs. *Royal Con. Mines Co.,* 157 Cal., 737, are fully discussed and annotated in the report of the latter case in 137 Am. St. Rep. 165. In the syllabus in that report the distinction between the case at bar and a case in which the vendor is a participant in the general scheme of the vendee and the vendee's grantees is clearly pointed out:

> "Where a corporation conveys mines free of incumbrance to an individual to form a corporation and transfer the property unincumbered to it, and the latter corporation is to issue and sell its shares in an amount above three times what the selling corporation is willing to take for the property, and ninety per cent of the shares are to be deposited in a bank to be

> dealt with in a specified manner, and a stated proportion of the sum realized on the sale of shares and from the operation of the mines is to go in satisfaction of the consideration stated in the agreement, the transaction is inconsistent with existence of a vendor's lien."

Undoubtedly, that is so, and that is the case counsel for appellee seek to make of the case at bar. Risking the Court's criticism of our tiresome reiteration, we submit that neither the evidence in this case, nor any inference properly to be drawn from the evidence, will justify any conclusion except that appellant and The Realty Union were dealing as ordinary vendor and vendee in this matter and that appellant is entitled to her vendor's lien as claimed.

Respectfully,

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